SUBRAMANIAM A/L RENGAN

v.

DR. A. PURIAPPAN

HIGH COURT MALAYA, IPOH
DATO' P.S. GILL J.
[CIVIL APPEAL NO. 16-3-88]
7 DECEMBER 1993

JURISDICTION : *Labour Officer holding inquiry - Acting under s. 69(1) of the Employment Act 1955 - Facts of case relating to events prior to amendment to s. 69 - Whether Director-General of Labour had power to question validity of dismissal without notice - Whether Labour Officer had jurisdiction to hold inquiry under s. 69(1) - Whether amendment to s. 69 of retrospective effect.*

INDUSTRIAL LAW : *Labour Officer awarding 8 weeks wages in lieu of notice of termination - Whether valid - Whether appellant had broken his contract of service - Labour Officer dismissing claim for termination benefits - Appeal against decisions of Labour Officer.*

The appellant was an employee of the respondent for 12 years. On 20 January 1983 the appellant was informed by the respondent that he should drive a tractor instead of a lorry in the course of his duties. On 21 January 1983 when the appellant went to work, an employee of the respondent refused to allow him to work as a lorry driver and asked him to work as a tractor driver instead. The appellant refused to do so and did not go to work any further.

The Labour Officer Teluk Anson held an inquiry under s. 69(1) of the Employment Act 1955 (the Act) and ordered the respondent to pay the appellant a sum of RM862.08, being 8 weeks wages in lieu of notice of termination but dismissed the appellant's claim for termination benefits.

The appellant appealed and the respondent filed a cross-appeal challenging the jurisdiction of the Labour Officer to hear and decide the complaint before him.

Held:

[1] Section 69(1) of the Act has been dealt with in the case of *Nylex (M) Sdn. Bhd. v. Alias bin Chek* and *Rajaretnam a/l Palaniandy v. Amalgamated Properties & Industries.* In both these cases it was held that a Labour Officer had no power to hold an inquiry under s. 69(1) of the Act in matters relating to dismissal or any claim for termination benefits pursuant to such dismissal.

[2] While it is true that the amendment to s. 69(3) of the Act has now conferred power on the Director-General of Labour to question the validity of a dismissal without notice for misconduct under s. 14(1)(a) of the Act, the facts of the present case relate to events prior to the amendment of s. 69 of the Act. As the amending Act did not expressly state that the amendment was to take effect retrospectively, the amendment to the Act takes effect on the date the Act is gazetted.

[3] In the circumstances of this case the Director-General of Labour had no power to question the validity of a dismissal without notice and the Labour Officer had no jurisdiction to hold the inquiry under s. 69(1) of the Employment Act 1955.

[4] From the evidence *in toto*, it is clear that the finding of fact made by the Labour Officer, that the appellant was offered employment as a tractor driver on terms no less favourable than before, is amply justified by the evidence. The appellant's refusal to work, most clearly, can be regarded as a repudiation of the contract of service. In the circumstances, the appellant's absence from

work was deliberate and without reasonable excuse, bearing in mind that the job of a tractor driver was suitable and within the capacity of the appellant to perform.

[5] Bearing in mind that the appellant deliberately refused to come to work after 21 January 1983 and applying the provisions of s. 15(2) of the Act, it is abundantly clear that the appellant had on his own volition broken his contract of service. As such the order made by the Labour Officer that the respondent pay the appellant a sum of RM862.08, being 8 weeks wages in lieu of notice of termination, is not supported by the evidence.

[Appeal dismissed with costs. Cross-appeal allowed with costs. Order of Labour Officer for payment of RM862.08 set aside]

Cases referred to:
Nylex (M) Sdn. Bhd. v. Alias bin Chek [1985] 1 CLJ 185 ***(foll)***
Rajaretnam a/l Palaniandy v. Amalgamated Properties & Industries [1988] 2 MLJ 363 ***(foll)***
Uvarajah & Anor v. Penolong Pengarah Buruh Butterworth & Ors. [1992] 2 MJ 152 ***(refd)***
Yong Yoke Sung & Ors. v. Sungai Way Estate [1965] 2 MLJ 299 ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 14(1)(a), 15(2), 69, (1), (3), 69A

For the appellant - Lobo, M/s. Lobo & Associates
For the respondent - Raj, M/s. Raj, Selva & Co.

JUDGMENT

P.S. Gill J:
This is an appeal from the decision of the Labour Officer, Teluk Anson given on 13 November 1986, whereby the respondent was ordered by the Labour Officer Teluk Anson to pay the appellant a sum of RM862.08 being 8 weeks wages in lieu of notice of termination and also against the order of the Labour Officer dismissing the appellant's claim for termination benefits.

The cross-appeal filed by the respondent challenges the jurisdiction of the Labour Officer to hear and decide the complaint before him.

The brief facts of the case are that the appellant was an employee of the respondent for 12 years. On 20 January 1983 the appellant was informed by his employer, the respondent, that he should drive a tractor instead of a lorry in the course of his duties. On 21 January 1983 the appellant went to work. When an employee of the respondent refused to allow the appellant to work as a lorry driver, and instead asked him to work as a tractor driver, the appellant refused to do so, stating that this would involve a reduction in his wages. The appellant did not go to work any further.

The inquiry before the Labour Officer was held under s. 69(1) of the Employment Act, 1955. Section 69(1) [insofar as it is relevant to this case] reads:

> [1] The Director General may inquire into and decide any dispute between an employee and his employer or between an employee and any person liable under this Act, or any regulations, order or other subsidiary legislation whatsoever made thereunder to pay any wages due to such employee where such dispute arises out of any term in the contract of service between such employee and his employer or out of any of the provisions of this Act, or any regulations, or other subsidiary legislation whatsoever made thereunder, and in pursuance of such decision may make an order in the prescribed form for the payment by either party of such sum of money as he deems just without, limitation of the amount thereof.

Section 69(1) of the Employment, Act has been dealt with in the case of *Nylex (M) Sdn. Bhd. v. Alias bin Chek* [1985] 1 CLJ 185 and in the case of *Rajaretnam a/l Palaniandy v. Amalgamated Properties & Industries* [1988] 2 MLJ 363. In both these cases it was held that a Labour Officer had no power to hold an inquiry under s. 69(1) of the Employment Act in matters relating to the dismissal or any claim for termination benefits pursuant to such dismissal.

In 1989, s. 69 of the Employment Act *vide* s. 69A was amended, thereby giving powers to the Labour Officer to hear a dispute involving dismissal and award of termination benefits. However, the facts of the present case refer to events that took place in 1983. Learned Counsel for the appellant has submitted that the validity of the dismissal is not being questioned in this case. He submitted that the Labour Officer can order indemnity in lieu of notice, and termination benefits under the Employment Act. He submitted that the power to order both these payments are explicit in s. 69 of the Employment Act, 1955 [before the amendment in 1989]. With respect to the submission made by the learned Counsel, I would disagree. It is clear that the facts in the present case relate to events in 1983, before the Amendment to s. 69 and as such the Court holds that the Director General of Labour had no power to question the validity of a dismissal without notice.

Counsel for the appellant also referred to the Court the case of *Uvarajah & Anor v. Penolong Pengarah Buruh Butterworth & Ors.* [1992] 2 MJ 152 in support of his contention that the Labour Officer had the power under s. 69 to hold an inquiry into a case where an employee was dismissed without notice. It is agreed that the amendment to s. 69(3) has now conferred power on the Director General of Labour to question the validity of a dismissal without notice for misconduct under s.14(1)(a) of an employer by his employee. However, the facts of the present case relate to events prior to the amendment of s. 69 in 1989. It is my view that the amendment to the Act takes effect upon the date the Act is gazetted i.e. in this case on 9 February 1989 and not restrospectively, unless so expressly stated, in the said amending Act.

I therefore hold that the Labour Officer had no jurisdiction to hold the inquiry under s. 69(1) of the Employment Act, 1955.

Apart from my reasons given regarding the jurisdiction of the Labour Officer to hear and adjudicate upon the claim made by the appellant, I wish to make a further finding on facts should I be held to err in law as to my interpretation of s. 69 of the Employment Act, 1955.

The appellant was employed as a driver by the respondent in Sussex Estate, Teluk Anson on 1 January 1971 as evidenced by the details given in the Register of Workman. His basic salary was RM9 per day and RM1.15 as a Special Relief Allowance. Apart from that the appellant was also paid for work relating to loading and overtime. On 20 January 1983, sometime in the evening, the appellant was told that with effect from 21 January 1983 he was to work as a tractor driver, at the same basic wage that he was paid to drive a lorry. On 21 January 1983 the appellant reported to work, and when asked to drive a tractor, refused to do so and thereafter did not return to work. The appellant further stated that apart from his basic wage as a driver he was paid RM2 for loading payable whenever there was any loading, and his overtime of RM8 to RM9 was variable depending on work done. He further stated that he was not given any notice of termination of service, but was transferred from one job to another job. He admitted that he had driven a tractor prior to 21 January 1983 and that he had been transferred from the job of a tractor driver to a lorry driver earlier. He had also worked as a tractor driver previously and did so on relief duty at the estate.

The respondent stated that the appellant was employed as a driver and tendered a document Exb. D1 which is the Register of Workman. The respondent confirmed that the basic salary of the

appellant was RM9 and RM1.15 special relief allowance. The respondent further stated that between 1971 and 1983, the appellant had worked as a tractor driver from time to time. The respondent confirmed that at the material time and date the appellant had been asked to drive a tractor, among other reasons there was a difficulty to get an attendant to work with the appellant for about two months prior to 21 January 1983. This was a temporary measure till an attendant was found. The appellant was further informed that there would be no change in his basic wage, and that he would also be given special relief allowance and any overtime due to him. In fact there would be no change in his salary. The appellant refused and stated that he wanted to work outside. The appellant left the work site and returned some three years later on 24 July 1986 when his name was struck off the clerk roll.

It was alleged by the appellant that he was asked to switch jobs because he was being punished for allegedly drinking alcohol during his working hours. This allegation was denied by the respondent. However, on the evidence it is clear that the appellant, although being offered the same wage as in his previous job as a lorry driver, refused to work as a tractor driver. The appellant's refusal to work as a tractor driver amounted to a repudiation of his contract of service. His refusal to obey the instruction of the respondent was clearly a breach of his contract of service. The proper course for the appellant to follow would have been to obey the order to driver a tractor for a few days and then on the basis of his salary put up a case if his earnings were reduced.

The appellant's absence from work was without reasonable excuse, bearing in mind that the job of a tractor driver was suitable and within the capacity of the appellant to perform. This point has been illustrated in the case of *Yong Yoke Sung & Ors. v. Sungai Way Estate* [1965] 2 MLJ 299.

From the evidence *in toto*, it is clear that the finding of fact made by the Labour Officer, that the appellant was offered the employment as a tractor driver on terms no less favourable than before, is amply justified by the evidence. I also hold that the appellant unreasonably refused to accept the offer to work as a tractor driver.

One other point is left to be considered. Whether the award made by the Labour Officer whereby he ordered the respondent to pay the appellant a sum of RM862.08 being eight weeks wages in lieu of notice of termination is a valid one.

Section 15(2) of the Employment Act states that an employee shall be deemed to have broken his contract of service with the employer if he had been continuously absent from work for more than two consecutive working days without prior leave, from his employer, unless he had a reasonable excuse for such absence, and has informed or attempted to inform his employer of such excuse, prior to, or at the earliest opportunity during such absence.

Bearing in mind that the appellant deliberately refused to come to work after 21 January 1983, it is abundantly clear that he had on his own volition broken his contract of service. As such the order made by the Labour Officer that the respondent pay the appellant a sum of RM862.08 being 8 weeks wages in lieu of notice of termination is not supported by the evidence. The order of the Labour Officer in regard to the payment of RM862.08 to be paid by the respondent to the appellant is set aside. I accordingly dismiss the appeal by the appellant with costs, and allow the cross-appeal by the respondent with costs.